☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: March 22, 2019
Time: 9:00 am
Judge: Hon. James Dixon

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

TIM EYMAN, et al.,

Defendants.

No. 17-2-01546-34

DEFENDANT TIM EYMAN'S MOTION FOR PARTIAL SUMMARY JUDGMENT STRIKING THE LIFETIME BAN

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I. INTRODUCTION AND RELIEF REQUESTED

The State asks this court to ban Mr. Eyman, for the rest of his life, from engaging in core political speech – speech that is at the heart of the protections of the First Amendment and of comparable provisions in the Washington State Constitution. The State has known the fundamental statutory and Constitutional weaknesses of the remedy it seeks, but has refused to back down. No possible argument can salvage the proposed relief in the face of the plain text of the statute and binding precedent from both the United States and Washington Supreme Courts. The State cannot secure the relief it requests, and its obstreperousness in continuing to demand that ban serves no legitimate interest. This Court must step in and finally adjudicate the legal question presented by this Motion, and strike from the State's Complaint its proposal to ban Mr. Eyman, for life, from engaging in core political speech.

II. EVIDENCE RELIED ON

Defendant Tim Eyman relies on this Motion for Partial Summary Judgment, as well as the pleadings, motions, declarations, and other evidence in the record of this case.

III. STATEMENT OF RELEVANT FACTS

Following a highly publicized state investigation instigated in August 2012 by a competitor of the Defendants, the State is pursuing a number of remedies against Mr. Eyman, including "temporary and permanent injunctive relief . . . including but not limited to barring Mr. Eyman from managing, controlling, negotiating, or directing financial transactions of any kind for any political committee in the future." Compl. at 11 (hereafter, the "Lifetime Ban"). The State relies on RCW 42.17A.750(1)(i)[1] as authorizing this requested relief. *See id.*

IV. ISSUES PRESENTED

1. Is the State prohibited from seeking the Lifetime Ban against Mr. Eyman because it is forbidden by, not authorized by, the statute?

[1] RCW 42.17A.750(1)(i) was previously codified at § 750(1)(h). Laws of 2018, ch. 304, § 12, S.H.B. No. 2938, added a subsection to § 750, thereby recodifying (h) as (i). The text is unchanged.

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2. Is the State prohibited from seeking the Lifetime Ban against Mr. Eyman because imposing the Lifetime Ban would violate his core state and federal constitutional rights to political speech?

V. ARGUMENT

A. The FCPA Does Not Authorize A Lifetime Ban.

The Fair Campaign Practices Act ("FCPA") does not grant the authority for the State to seek, or for this Court to impose, the proposed Lifetime Ban. The FCPA grants the authority for imposition of an injunction mandating performance of FCPA obligations. It also authorizes court ordered bans on forbidden conduct, namely violations of the FCPA. It does *not* authorize bans on otherwise permissible conduct, much less bans on permissible, constitutionally protected political speech, for which the FCPA only requires certain kinds of additional speech in the form of disclosure.

The State asserts that RCW 42.17A.750(1)(i) authorizes the proposed Lifetime Ban. Section 750(1) first provides that "[i]n addition to the penalties in subsection (2) of this section, and any other remedies provided by law, one or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law." Then, in the language the State relies on as authorizing its proposed remedy, RCW 42.17A.750(1)(i), only authorizes that "[t]he court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein." In other words, § 750(1)(i) authorizes the courts to enjoin someone from violating FCPA or to compel them to comply with the terms of the FCPA.

The State flips this language on its head when it contends that § 750(1)(i) authorizes the proposed Lifetime Ban, a ban which it asserts should "include[e] but not [be] limited to barring Mr. Eyman from managing, controlling, negotiating, or directing financial transactions of any kind for *any* political committee in the future." Complaint ¶ 6.3 (emphasis added). Every recited act which the state proposes to include in the Lifetime Ban is *permitted*, not *prohibited.*

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Section 750(1)(i) only authorizes prophylactic judicial bans on future violations of already prohibited conduct. Nothing in the statute authorizes any ban on otherwise permissible conduct – much less where that permissible conduct constitutes the core of First Amendment protected speech.

The FCPA does not prohibit "managing, controlling, negotiating, or directing financial transactions of any kind for any political committee," the State's bare minimum proposed scope of the Lifetime Ban. The FCPA certainly regulates the conduct of people who do choose to manage, control, negotiate, or direct financial transactions for political committees. As such, engaging in any of those activates constitutes lawful conduct, albeit lawful conduct that requires, *e.g.*, FCPA disclosures. But § 750(1)(i) does not authorize the court to enjoin a person from engaging in otherwise permissible conduct that the FCPA regulates. It only authorizes injunctions against prohibited conduct. Nothing in the FCPA bars a citizen from lawfully managing, controlling, negotiating, or directing financial transactions of any kind for any political committee, and thus nothing in the statute authorizes a court to enjoin a citizen from engaging in those lawful activities.

The state's proposed reversal of the statutory language – using the available prophylactic ban on *forbidden* conduct to justify a ban, for life, on all manner of *permissible* conduct – violates every rule of statutory construction. The primary duty in interpreting any statute is to determine and implement the intent of the legislature. *National Elec. Contractors Ass'n v. Riveland*, 138 Wash. 2d 9, 19 (1999). To find that intent, the court begins with "the statute's plain language and ordinary meaning." *Id.* When the statutory language can only have one meaning, the legislative intent is apparent. "Plain language does not require construction." *State v. Wilson*, 125 Wash. 2d 212, 217 (1994). Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wash. 2d 723 (2003). Here, the plain language and ordinary meaning of the statute requires no mental gymnastics to understand: the court may order compliance with

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FCPA mandates and may forbid violations of FCPA prohibitions. To find authorization for the proposed Lifetime Ban requires adding words to the statute, because the state seeks a court ordered prohibition which does not reach forbidden conduct, as the statute recites, but covers lawful, permissible, constitutionally protected speech.

This construction, as discussed in greater detail below, would render the statute unconstitutional as applied to Mr. Eyman. Such a construction violates the state Supreme Court's longstanding rule that a statute should be construed, where possible, to comply with, not to violate, the constitution. "We construe statutes to avoid constitutional doubt." *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wash. 2d 398, 434–35, 341 P.3d 953, 971 (2015). This canon of construction follows the lead of the United States Supreme Court, which agrees that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Thus, applying the canon, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Here, the state asks this court to rewrite a statute that authorizes injunctions compelling compliance with a statute, and turn it into a statute that authorizes injunctions prohibiting an individual from acting in compliance with the statute – for life. This cannot be a permissible interpretation of the FCPA. Turning the plain language of § 750(1)(i) inside out to authorize the proposed Lifetime Ban would render it unconstitutional, whereas simply giving it the normal meaning of its plain terms avoids this constitutional flaw. As such, even if the court found that a plausible construction of the statute authorized the proposed Lifetime Ban, the Court must prefer the constitutionally permissible construction excluding such an authorization.

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This court cannot impose the State's proposed remedy barring Mr. Eyman from permissible conduct of engaging with *any* political committee, for the rest of his life, because no such authorization can be found in civil remedies and sanctions authorized by FCPA.

B. A Lifetime Ban Would Violate Mr. Eyman's Constitutional Rights To Freedom Of Speech And Association.

1. A Lifetime Ban Is A Prior Restraint On Speech Prohibited Under The Washington And U.S. Constitutions.

The Lifetime Ban is an unconstitutional prior restraint on speech. If imposed, it is an official restriction imposed on speech in advance of the speech being made. Prior restraints are categorically unconstitutional under the Washington Constitution: "the plain language of Wash. Const. art. 1, § 5 seems to rule out prior restraints under any circumstances, leaving the State with only post-publication sanctions to punish abuse of free speech rights."[2] *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 117 (1997); *see also Bering v. Share*, 106 Wash. 2d 212, 242 (1986). These decisions each recognize Washington citizens' constitutionally-protected right to "freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. art. I § 5. The United States Supreme Court has been consistent as well, stating that "any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 723 (1971) (internal citations and quotations omitted). "Regulations that sweep

[2] The Washington Constitution does not always provide greater protection for speech than the federal constitution. *See, e.g., Ino Ino*, 132 Wash. 2d at 116 (noting no greater state speech protections for, *i.a.*, nude dancing or defamatory statements). However, one need not analyze whether the state constitution offers greater protections to this core political speech than does the federal constitution under the factors outlined in *State v. Gunwall*, 106 Wash. 2d 54, 58 (1986), because the proposed remedy is an unconstitutional prior restraint under *either* the U.S. or Washington Constitution.

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too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint." O'Day v. King Cty., 109 Wash. 2d 796, 804 (1988).[3]

Prior restraint may occur in two ways: (1) when "'official restrictions [are] imposed upon speech or other forms of expression in advance of actual publication'" or (2) when "expression is foreclosed prior to an 'adequate determination that it is unprotected by the First Amendment.'" *State v. J-R Distribs. Inc.*, 111 Wash. 2d 764, 776 (1988); *see also Forbes v. Seattle*, 113 Wash. 2d 929, 934-35 (1990); *Seattle v. Bittner*, 81 Wash. 2d 747, 756 (1973) (describing prior restraints as "official restrictions imposed upon speech or other forms of expression in advance of actual publication").

Here, the Lifetime Ban obviously constitutes an unconstitutional prior restraint. A state-imposed Lifetime Ban would be an "official restriction imposed upon [Mr. Eyman's] speech or other form of expression in advance of publication" and it would "foreclose [Mr. Eyman's expressions] prior to an adequate determination that it is unprotected by the First Amendment." *See J-R Distribs. Inc.*, 111 Wash. 2d at 776.

Further, the Lifetime Ban is designed to prevent Mr. Eyman from speaking in one of the most powerful venues of political speech in Washington State: participation in political action committees. Mr. Eyman has been a widely publicized political activist in the State of Washington for the last twenty years. *See, e.g.*, *Conservatives Honor Eyman with Ronald Reagan Award*, Seattle Times, Jan. 27, 2000, *Tim Eyman Is a "Modern-Day Sam Adams," Says Conservative Awards Group*, Seattle Weekly, April 11, 2011. For decades, he has been continuously engaged in state politics through involvement in political committees such as Voters Want More Choices. *See* Complaint ¶ 2.2. Mr. Eyman, principally through his work

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[3] The few limited and extreme instances where prior restraint does not violate the U.S. Constitution are undisputedly not applicable here. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (noting that prior restraint *may* be appropriate in cases of obscenity, incitement to acts of violence, and speech that directly threatens military security); *see also New York Times Co.*, 403 U.S. 713 (declining to restrain the publication of classified information).

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with political committees, organizes state ballot initiative drives and campaigns on matters of political importance to the citizens of the State of Washington. *See, e.g.*, *Tim Eyman files 17 initiatives on taxes, tolls, car tabs, more*, KOMONews.com, Jan. 21, 2015. Under the FCPA, nearly any expenditure of funds and pooling even relatively small amounts of money require registration and reporting. The Lifetime Ban seeks to preemptively and therefore unconstitutionally prevent Mr. Eyman from doing what he has consistently done for the past twenty years: speak out on important matters of public concern by means of Washington political committees. This kind of speech is "central to the meaning and purpose of the first amendment." *Citizens United v. FEC*, 558 U.S. 310, 329 (2010). Under the broad definition of "political committee" outlined in the FCPA (and the State's even broader construction of the FCPA generally), the Lifetime Ban is nothing less than an unconstitutional prior restraint on *any* meaningful participation in initiative campaigns.

2. A Lifetime Ban Is An Unconstitutional Prohibition On Mr. Eyman's Guaranteed First Amendment Right Of Free Association.

Imposition of the proposed Lifetime Ban would violate Mr. Eyman's fundamental rights to free association, guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. The U.S. Supreme Court has long recognized a First Amendment right to associate for the purpose of speaking, which the courts have termed a "right of expressive association." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006); *see also BSA v. Dale*, 530 U.S. 640, 644 (2000). "The reason [the Court has] extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others." *Id.*; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). In *Roberts*, the Court held that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* "This right is particularly crucial in preventing the majority from

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imposing its views on groups that would rather express other, perhaps unpopular, ideas." *BSA*, 530 U.S. at 647-48. "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

"The Court has recognized that the First Amendment protects the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (internal quotations omitted). The government may not "interfere with a [political] party's internal affairs" absent a "compelling state interest." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). "Associations, no less than individuals, have the right to shape their own message." *Perry*, 591 F.3d at 1162. Part and parcel of traditional political behavior includes "conducting campaigns and political activity." *Cal. Democratic Party*, 530 U.S. at 581. "This fundamental freedom can only be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *BSA*, 530 U.S. at 648 (2000). If the government could restrict individuals' ability to join together and speak, it could thereby silence views that the First Amendment protects. *Id.* In view of the fundamental nature of the right to associate, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

The Lifetime Ban as contemplated here violates Mr. Eyman's right to free association because it prohibits him from joining with others for the purposes of associating and speaking. The Courts have routinely struck down such governmental limitations. *See, e.g., Speechnow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*). The FCPA already includes explicit provision for policing and sanctioning violations of the statute. Those sanctions include both financial penalties and injunctive orders compelling compliance.

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As such, the State cannot demonstrate any compelling interest in depriving untold numbers of other Washington citizens from associating with Mr. Eyman through his leadership or formation of political committees. The State's requested relief would violate fundamental free association rights even more broadly by limiting Mr. Eyman's rights to participate and speak with not just a political party, but also *any* political committee whatsoever which is required to register with Washington State. Even if the State could demonstrate some interest in depriving Mr. Eyman of his fundamental rights to freely associate with others similarly situated, it could not demonstrate any interest whatsoever in depriving Washington's citizens of their own associational rights to join with Mr. Eyman to engage in combined, protected, political speech. The State cannot demonstrate a valid justification to seek the Lifetime Ban and thereby deprive Mr. Eyman of guaranteed First Amendment rights.

3. A Lifetime Ban Would Infringe Mr. Eyman's Right To Petition Under Washington's Constitution.

The State of Washington has long recognized the importance of the right of people to petition the government. *See Cooper v. Hindley*, 70 Wash. 331, 336 (1912) ("[n]o government has ever remained free unless the right of petition has been kept inviolate"). The Lifetime Ban also violates Mr. Eyman's right to petition and the reservation of power to citizens of Washington to promote initiatives under Article I, Section 4 and Article II, Section 1 of the Washington State Constitution. *See e.g.*, *Fire Prot. Dist. v. City of Moses Lake*, 145 Wash. 2d 702, 732 (2003).[4] "The right of petition and of the people peaceably to assemble for the common good ***shall never be abridged***." Wash. Const. art. I § 4. Washington's citizen initiative

[4] *See also State ex rel. Wells v. Dykeman*, 70 Wash. 599, 602 (1912) (article I, section 4 guarantees people the right "to make such recommendations as they may conclude are for common good"); *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 320 (1915) (in discussing importance of initiatives and referendums, court stated that "[t]he people have a right to adopt any system of government they see fit to adopt"); *Save Our State Park v. Hordyk*, 71 Wash. App. 84, 90 (Wash. Ct. App. 1993) (the rights to initiative and referendum are "sovereign rights of the citizen-the right to speak ultimately and finally in matters of political concern") (quoting *State ex rel. Mullen v. Howell*, 107 Wash. 167, 171 (1919)).

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process is a fundamental aspect of the right to petition the government: "[T]he people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power . . . to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature" through initiatives and referendums. Wash. Const. art. II § 1(a). Together, these constitutional provisions protect Washingtonians' participation in the state political process, including participation in political campaigns, ballot initiatives, and referenda. Actions implicating such a right receive heightened scrutiny. *Fire Prot. Dist.*, 145 Wash. 2d at 732.

"Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 (1985) (citing *NAACP v. Claiborne Hardware*, 458 U.S. 886, 911-915 (1982)). Washington courts interpret the state constitutional right to petition as "consistent with the First Amendment." *Richmond v. Thompson*, 130 Wash. 2d 368, 383 (1996). Further, as this state's courts have recognized and applied"[t]he [United States] Supreme Court has extended the right to petition to all departments of government." *State v. Wyant*, 164 Wash. App. 1003 (2011) (citing *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). "While States have broad power to regulate economic activity, [the United States Supreme Court does] not find a comparable right to prohibit peaceful political activity . . . . [The] Court has recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values. . . . Speech concerning public affairs is more than self-expression; it is the essence of self-government. There is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *NAACP*, 458 U.S. at 913 (internal quotations omitted).

Here, by asking the court to ban Mr. Eyman from directing spending for a political committee, the State proposes to bar Mr. Eyman from effectively petitioning the government by prohibiting his access to the very tools that facilitate the most direct, powerful, and efficient

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petitioning. Petitioning is the power of the people to engage in direct lawmaking, and without the ability to participate in the planning and execution of a political committee, this denies Mr. Eyman the only legal way to engage in direct lawmaking under Washington law. The proposed Lifetime Ban would clearly and directly violate Article I, Section 4 and Article II, Section 1(a) of the Washington State Constitution. Given the fundamental nature of Washingtonians' right to petition their government, no prohibition of an individual's ability to participate in this process – for his entire life – can pass constitutional muster.

Because of the severity of the State's proposed "remedy," granting such relief would severely violate Mr. Eyman's fundamental right to petition his government under the Washington Constitution by preventing him from garnering or spending resources for signatures in furtherance of his activity or joining with others to do the same. This is a proposed ban on any effective or meaningful participation in initiatives in light of the fact that no modern initiative has ever qualified for the ballot in Washington without the support of a political committee. This punishment would not further any compelling government interest because the government cannot have a valid interest in imposing lifetime speech bans on its citizens. There are clearly less restrictive options than a Lifetime Ban available to ensure compliance with the state's campaign finance laws, such as the audit and field investigation authority the FCPA provides to the Public Disclosure Commission. *See* RCW 42.17A.110(4). And, of course, the State's remedy would not at all be narrowly tailored because it involves activities that go beyond any alleged impropriety, including prohibiting speech properly disclosed to the State. "[A]s a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)). As noted, Section 42.17A.110 empowers the Public Disclosure Commission to use means significantly less restrictive than a Lifetime Ban on political activity to achieve compliance with Washington law. As a result, the State's unconstitutional remedy must be denied as a matter of law.

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4. A Lifetime Ban Is A Content-Based Restriction On Political Speech That Unjustified By Compelling State Interest.

The Lifetime Ban is a content-based restriction on core, protected, political speech. As such, it could only survive the require strict scrutiny analysis if the State could show that it was narrowly tailored to serve a compelling state interest. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("[A] speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter."). First, it is important to remember the First Amendment's primary purpose is to protect political speech: "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 228 (2014) (Thomas, J. concurring) (internal quotations omitted). Such speech lies at the "heart of the protections of the First Amendment," *281 Care Committee v. Arneson*, 638 F.3d 621, 635 (8th Cir. 2011), and is, "at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (internal quotations omitted). A content-based restriction on core protected political speech must receive the most exacting scrutiny under the First Amendment. *ACLU of Nev. v. Heller*, 378 F.3d 979, 992 (9th Cir. 2004); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 344, 346-47 (1944); *Van Hollen v. Federal Election Comm'n,* 811 F.3d 486 (D.C. Cir. 2016); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015).

Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny. *Collier v. City of Tacoma*, 121 Wash. 2d 737, 748-49 (1993). The Supreme Court recently made clear that even a subject-matter based restriction on speech is subject to strict scrutiny. In *Reed*, 135 S. Ct. 2218, the Court explained that "the crucial first step in the content-neutrality analysis" is to "determin[e] whether the law is content neutral on its face." *Id.* at 2228. At the second step, a facially content-neutral law will still be categorized as content-based if it "cannot be 'justified without reference to the content of the regulated speech,' or . . . adopted by the government 'because of disagreement with the message [the

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speech] conveys.'" *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The *Reed* Court held that strict scrutiny is the appropriate level of review when a law governs any "specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230; *see also Nat'l Assoc. for Gun Rights, Inc. v. Motl*, 188 F. Supp. 3d 1020, 1035 (D. Mont. 2016) (holding that Montana's requirement that "printed election material" must include details on a candidate's voting record and a signed statement that information presented about the voting record is true and accurate *only if* the materials reference a candidate's voting record, is content-based and subject to strict scrutiny). *Reed* has therefore made clear that, at the first step, the government's justification or purpose in enacting the law is irrelevant. *See id.* at 2228-29; *see also Free Speech Coalition, Inc., et al. v. Attorney General United States of America*, 825 F.3d 149 (3d Cir. 2016); *Cahaly*, 796 F.3d at 405; *State v. Bishop*, 368 N.C. 869 (N.C. 2016).

The effect of the content-neutrality inquiry is sweeping, particularly as it relates to penalties *even where clearly imposed* by statute. For instance, in *Packingham v. North Carolina*, the Supreme Court went so far as to use this analysis to strike down a law that prevented the use of social media by a convicted sex offender, holding that a statute "enacts a prohibition unprecedented in the scope of First Amendment speech it burdens." *Packingham*, 137 S. Ct. at 1737. In *Packingham*, a North Carolina statute prohibited a sex offender from accessing social media for the remainder of that person's natural life. The Supreme Court held that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights," and that "[i]t is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences." *Id.* at 1737; *see also Manning v. Powers*, 281 F. Supp. 3d 953, 961 (C.D. Cal. 2017) (holding that a defendant found guilty of multiple charges related to sexual assault against a minor could not be prohibited from using or accessing social media sites, because the "condition is not narrowly tailored to serve a compelling government interest").

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Similarly, the U.S. Court of Appeals for the Third Circuit recently applied the methodology of *Reed* in the context of the recordkeeping requirements contained in the Child Protection and Obscenity Enforcement Act and the Adam Walsh Child Protection and Safety Act of 2006, codified at 18 U.S.C. §§ 2257 and 2257A. *Free Speech Coalition*, 825 F.3d at 149. There, the court stated that *Reed* required it to reconsider its previous holding that the statutes survived an intermediate scrutiny analysis, and instead found that the statutes are indeed content-based and were therefore subject to strict scrutiny. The court held that "[T]he language of *Reed* is plain. It clearly rejects any justification of a facially content-based law because of some benign purpose." *Id.* at 163 n.10. In determining that a strict scrutiny analysis applied to the recordkeeping requirement, the court held that "Despite the very commendable purpose . . . we can no longer look to the purpose of a law that draws a content-based distinction on its face in determining what level of scrutiny to apply."[5] *Id.* at 164.

The North Carolina Supreme Court also struck down a content-based remedy barring speech in *State v. Bishop*, 368 N.C. 869, 787 S.E.2d 814 (2016), in which it held that a cyber-bullying statute was content-based and was subject to strict scrutiny based on the holding of *Reed*. There, the Court noted that after *Reed*, "several paths can lead to the conclusion that a speech restriction is content-based and subject to strict scrutiny. This determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message." *Id.* at 875. The North Carolina court held that because the "statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication," it is therefore a content-based limitation on speech. *Id.* at 876.

[5] In reaching this conclusion, the court highlighted that "Our sister circuits have also noted that *Reed* represents a drastic change in First Amendment jurisprudence," citing both to *Cahaly*, 796 F.3d 399 and *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). *Free Speech Coalition*, 825 F.3d at 160 n.7.

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Assuming *arguendo* that the statute relied on by the State is broad enough to even encompass the proposed relief, the Lifetime Ban is certainly a content-based regulation on Mr. Eyman's right to speak. In order to enforce the severe limitation on speech and privacy of association requested by the State, an enforcement officer must first look to the content of the speech made by Mr. Eyman. If Mr. Eyman engages in political speech that requires registration under the statute with the Washington Public Disclosure Commission, then he would violate the injunction the State proposes. But if Mr. Eyman instead speaks on matters that do not require registration under the FCPA, such as speech encouraging the election or defeat of a federal candidate, he would not violate the requested injunction.

Washington has minimal threshold requirements to trigger registration as a political committee in Washington: Merely that one anticipates making expenditures in support of or opposition to any state candidate or ballot measure. *See* RCW 42.17A.205(1). Such a hair trigger for the proposed Lifetime Ban means the ban would effectively eliminate Mr. Eyman's ability to engage in political speech about some of the most salient political issues in the state – and yet would not reach similar speech on federal political issues. The Supreme Court has been clear for decades on a central tenet of campaign finance law: expenditures in support of fundamental political speech is equivalent of speech itself. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 57-58 (1976).[6] The Lifetime Ban would therefore create a content-based restriction on Mr. Eyman's right to spend, direct the spending of, or raise *even $1* to promote core political speech, which has been held to be as fundamental a freedom as the speech itself. Further, the State does not propose any limit on its sought-for blanket prohibition of Mr. Eyman's speech.

[6] "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. . . . [T]he First Amendment requires the invalidation of the Act's independent expenditure ceiling, its limitation on a candidate's expenditures from his own personal funds, and its ceilings on overall campaign expenditures. These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." (internal citations omitted). *Buckley*, 424 U.S. at 57-58.

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Therefore, the State cannot justify the proposed Lifetime Ban as a valid time, place, or manner restriction on speech. *See, e.g.*, *State v. Coe*, 679 P.2d 353, 359 (Wash. 1984) (holding that an order that did not include any temporal or geographic limits as to its speech prohibitions cannot be characterized as a time or place restriction).

As a clear content-based regulation of speech, the statute must survive the strict scrutiny test, the second and third step in the constitutional analysis. Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (quoting *Reed*, 135 S. Ct. at 2226); *see also Collier*, 121 Wash. 2d at 749. Under a strict scrutiny analysis, the government must show that "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968) (internal citations omitted). The restriction cannot be overinclusive by "unnecessarily circumscrib[ing] protected expression," *Brown v. Hartlage*, 456 U.S. 45, 54 (1982). "[I]t is the 'rare case in which a speech restriction withstands strict scrutiny.'" *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring in the judgment) (citation and alterations omitted). Further, Washington's free speech guaranty requires the court to pay especially close attention to allegations of overbreadth. "Freedom of speech is a preferred right under the Washington Constitution." *State v. Reyes*, 104 Wash. 2d 35, 43 (1985).

There is no reason for this Court to deviate from the unbroken tradition of the United States Supreme Court of striking down nearly every content-based restriction on speech that

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must pass strict scrutiny. The government's interests can be advanced by more narrowly tailored means -- such as the other remedies requested by the State. Financial penalties can serve as a deterrent to Mr. Eyman and others similarly situated, and even a narrowly-drawn injunction against making political committee reports that violate the FCPA and its implementing regulations could more narrowly target any alleged violation by Mr. Eyman than would the requested Lifetime Ban on core protected political speech. Standing alone, this overbroad restriction on speech is sufficient for this court to eliminate the possibility of the State obtaining a Lifetime Ban on Mr. Eyman's rights to core political speech.

5. A Lifetime Ban Violates Article 1, Section 12 Of The Washington state Constitution And The 14th Amendment Of The United States Constitution As Applied To Mr. Eyman.

The Lifetime Ban, if applied to Mr. Eyman,[7] would discriminate against him based on his political views. To counsel's knowledge, and essentially conceded by the State, the State has never before sought a Lifetime Ban as a sanction for an alleged violation of the FCPA. In the State of Washington, "[e]qual protection under the law is guaranteed by both the Fourteenth Amendment to the United States Constitution and [the Privileges and Immunities Clause found in] article 1, section 12 of the Washington Constitution." *State v. Hirschfelder*, 170 Wash. 2d 536, 550 (2010). The Privileges and Immunities Clause of the Washington Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "have the same import" and are therefore "appl[ied] as one." *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 427 (1968). "The aim of equal protection is "securing equality of treatment by prohibiting undue favor' or 'hostile discrimination.'" *Hirschfelder*, 170 Wash. 2d at 550 (citing *Anderson v. King County*, 158 Wash. 2d 1, 15 (2006)).

In order to bring an "as-applied" challenge on equal protection grounds, "the party challenging the statute" must show "that the statute, as actually applied, violated the

[7] This section assumes *arguendo* that the provision at issue, RCW § 42.17A.750(1)(i), contemplates the remedy that the State seeks, which it demonstrably does not.

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constitution." *Tunstall v. Bergeson*, 141 Wash. 2d 201, 223 (2000). Here, the statute in question states that a "court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein." RCW § 42.17A.750(1)(i). As proposed by the State, this statute would be deployed against only Mr. Eyman to permanently enjoin "Defendant Eyman from managing, controlling, negotiating, or directing financial transactions of *any kind* for *any* political committee in the future." Complaint ¶ 6.3 (emphasis added). The State requests a troubling, overreaching sanction. Any prohibition on "managing, controlling, negotiating, or directing financial transactions" is effectively a prohibition on engaging in political speech by managing or directing campaign committees in Washington State.[8] *See* Wash. Admin. Code 390-05-245 ("For the purposes of chapter 42.17A RCW and Title 390 WAC . . . 'officer of a political committee' includes the following . . . any person who alone or in conjunction with other persons makes, directs, or authorizes contribution, expenditure, strategic or policy decisions on behalf of the committee."). The expenditure of funds is political speech and is therefore protected by the first amendment. *See Buckley*, 424 U.S. 1; *Citizens United*, 558 U.S. 310. The proposed Lifetime Ban would infringe on Mr. Eyman's speech, association, and petition rights, all of which are fundamental forms of expressive association. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wash. 2d 570, 601 (2008) (citing *Roberts*, 468 U.S. at 618).

"The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved." *Hirschfelder*, 170 Wash. 2d at 550. Strict scrutiny obviously applies to any "suspect classification" such as "race, alienage, and national origin." *Am. Legion Post No. 149*, 164 Wash. 2d at 608. However, in the Equal Protection context,

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[8] The requested relief as written by the State is inherently vague. It is unclear whether the language "managing, controlling, [and] negotiating" is applicable to only "financial transactions" or, instead, applicable directly to "campaign committees." *See* Complaint ¶ 6.3. For the purposes here, we will assume that the language is applicable to only "financial transactions." In the end, the difference is one of semantics, since the result is the same: a complete lifetime prohibition on involvement with political committees in the state of Washington.

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"strict scrutiny applies to laws burdening fundamental rights or liberties." *Id.* at 609. Mr. Eyman's ability to speak through a political committee in the State of Washington directly implicates his First Amendment rights of speech, association, and petition under the U.S. Constitution as well as those rights found within Articles I and II of the Washington Constitution. *See* U.S. Const. amend. I; Wash. Const. art. I § 4; Wash. Const. art. II § 1(a). Therefore, the State must meet exacting scrutiny to show "that the infringement [of rights] be narrowly tailored to serve a compelling state interest." *Am. Legion Post No. 149*, 164 Wash. 2d at 600, n.25 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Restrictions on free speech rights "must be sensitively imposed." *State v. Bahl*, 164 Wash. 2d 739, 757 (2008); *see also Shaw v. Hunt*, 517 U.S. 899, 908 (1996) ("A State . . . is constrained in how it may pursue that end: The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.") (internal quotations omitted). The government cannot possibly meet that standard here.

First, as a preliminary matter, the government action cannot be narrowly tailored because, as discussed above, the State seeks to goes beyond any remedy contemplated by the statute itself.[9] *See* RCW 42.17A.750. No surprise: in no civil enforcement context is the State permitted to enjoin a defendant from engaging in a fundamental right for the rest of his life. In fact, the most closely analogous situation to this is the denial of the franchise to convicted felons. Yet even there, a felony conviction does not result in a lifetime ban in this state. *See* RCW 29A.08.520(1). Even the right to vote is restored in Washington once a person leaves the custody of the Department of Corrections. *Id.* Mr. Eyman is a public figure, well known to both the State and its citizens for his ballot initiative work. *See, e.g., Another Winner on Election Night: Tim Eyman*, Wash. State Wire, Nov. 7, 2012. A Lifetime Ban on managing and directing political committees is not a narrowly tailored remedy as proposed by the State,

[9] If the statute provided the remedy the State seeks, the law would likely be facially invalid under both State and Federal law. *See e.g., Packingham*, 137 S. Ct. at 1737.

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especially when the sanction sought is one not specifically contemplated by the FCPA. The Court cannot possibly impose the Lifetime Ban sought by the State.

6. A Lifetime Ban Violates Mr. Eyman's Substantive Due Process Rights.

The proposed Lifetime Ban would violate Mr. Eyman's due process rights under the 14th Amendment to the U.S. Constitution and Article 1 § 3 of the Washington Constitution because he has a liberty interest in making political speech through political committees. In interpreting the state constitution's due process provision, the Washington Supreme Court gives "great weight" to the United States Supreme Court's decisions interpreting the federal due process clause. *See Olympic Forest Prods v. Chaussee Corp.*, 82 Wash. 2d 418, 422 (1973). Furthermore, if the Fourteenth Amendment provides greater protection than does the Washington Constitution, then "the federal constitution must prevail." *Id.* The Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)); *see also Amunrud v. Bd. of Appeals*, 158 Wash. 2d 208, 218-19 (2006) ("Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures"). "The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Glucksberg*, 521 U.S. at 720. Those "specific freedoms protected by the Bill of Rights" are the kinds of "liberty" interests the Due Process Clause protects. *Id.*; *see also McDonald v. City of Chicago*, 561 U.S. 742, 763 (2010) ("The Due Process Clause of the Fourteenth Amendment fully incorporates particular rights contained in the first eight Amendments"). The right to freely speak, associate, and petition are fundamental rights found within both the federal and Washington Constitutions. *See* U.S. Const. amend. I; Wash. Const. art. I § 4; Wash. Const. art. II § 1(a); Wash. Const. art. I § 5.

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Furthermore, the Fourteenth Amendment guarantees substantive due process of law, "which forbids the government" from interfering with "certain fundamental liberty interests *at all*, no matter what process is provided" unless that interference satisfies strict scrutiny review. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis in original). The Supreme Court of the United States "in substantive-due-process cases [requires] a careful description of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721. "Accordingly, [the Court] must formulate the asserted right by carefully consulting both the scope of the challenged regulation and the nature of Plaintiffs' allegations." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085-86 (9th Cir. 2015); *see also Collins*, 503 U.S. at 125.

In this instance, the scope of the challenged regulation and the nature of the State's allegation are identical. The proposed sanction would ban Mr. Eyman from directing and making political speech—a fundamental right—by associating with a political committee—another fundamental right—in order to petition the State of Washington to change its laws—yet another fundamental right—*for the rest of his life*. Complaint ¶ 6.3; *see State ex rel. Superior Court of Snohomish Cty. v. Sperry*, 79 Wash. 2d 69, 75 (1971) (noting that injunctions that constitute prior restraints on speech violate the U.S. Constitution). Also, since the proposed Lifetime Ban impacts fundamental rights, strict scrutiny is appropriate. *See Amunrud*, 158 Wash. 2d at 220 ("State interference with a fundamental right is subject to strict scrutiny."). The sanction requested by the State cannot possibly survive strict scrutiny. A Lifetime Ban on the exercise of a fundamental right is in no sense narrowly tailored and no interest can be so compelling as to justify the State completely and permanently denying Mr. Eyman's constitutional rights to enforce a civil statute.

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VI. CONCLUSION

For the foregoing reasons, the Court should strike from the Complaint the relief sought insofar as the State seeks "temporary and permanent injunctive relief . . . including but not limited to barring Mr. Eyman from managing, controlling, negotiating, or directing financial transactions of any kind for any political committee in the future."

Respectfully submitted this 8th day of February, 2019.

By _____

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CERTIFICATE OF SERVICE

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that on February 8, 2019, I served the foregoing via email per agreement between the parties on the following:

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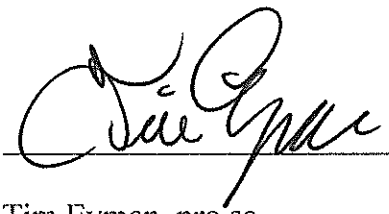
By 

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